In the Supreme Court of the United States.

OCTOBER TERM, 1912.

THE PEOPLE OF PORTO RICO, appellants,
v.
MANUEL ROSALY Y CASTILLO, appellee.
No. 145.

APPEAL FROM THE SUPREME COURT OF PORTO RICO.

BRIEF FOR APPELLANT.

Statement.

This case comes here upon an appeal from a judgment of the Supreme Court of Porto Rico, affirming a judgment of one of the District Courts of the Island sustaining an action of ejectment and damages for mesne profits, brought against Porto Rico without its consent, and sustained over its resistance (R. 13 to 14, 17). Although an action at law, it was not tried by jury and, therefore, is rightly brought here by appeal, according to the provisions of section 35 of the Act of April 12, 1900, (31 Stat., 85), and section 2 of the Act of April 7, 1874, (18 Stat., 27), (*Garzot* v. *de Rubio*, 209 U. S., 283, and *Murphy* v. *Ramsey*, 114 U. S., 15, 35).

The Issue.

The single question (Ass'n. R. 29) raised by the record is this:

> *Does the body politic known as The People of Porto Rico, by virtue of the government established by its organic act, enjoy exemption from suit without its own permission, which does not extend to this case.*

The supreme court of the island has answered this question in the ~~affirmative.~~ negative. (Opinion R. 13 and now reported in 16 P. R. Rep. 481.) The unsoundness of this decision is so clear, in view of the decision of this Court in *Kawananakoa* v. *Polyblank*, (205 U. S. 349), is so fully shown in the dissenting opinion of Justice MacLeary, (R. 18), the decision of the Federal Court of Porto Rico in *Elkins* v. *Porto Rico*, (5 Fed. Rep. P. R., 103), and the decision of the Supreme Court of New York in *Richmond* v. *Porto Rico*, (99 N. Y. Supp. 743), that very little argument is here called for.

Argument.

I.

THE ORGANIC ACT OF PORTO CREATED A SELF-GOVERNING SOVEREIGNTY FOR PURPOSES OF IMMUNITY FROM SUIT WITHOUT CONSENT.

By the Foraker Act of April 12, 1900, (31 Stat. 77, 79), Congress, for all purposes of internal administration, established Porto Rico as an organized territory. As recently declared by this court, "the purpose of the act is to give local self-government, conferring an autonomy similar to that of the states

and territories," (*Gromer* v. *Standard Dredging Co.*, 224 U. S. 362, 370). Along well established lines of territorial governments, Congress created a definite structure of local administration with full power in the local legislature to make and change the laws of contract and property, subject only to the customary reserve power of Congress as a "protection against abuse," (sections 15 and 32, Act of Congress of April 12, 1900). Only for political reasons has the technical designation of "territory" been withheld by Congress—but every attribute of sovereignty that any of the territories possess has been conferred,[1] (*Kopel* v. *Bingham*, 211 U. S. 468, 476; *In re Kopel* 148 Fed. Rep. 505, 507).

From the very nature of the Government of Porto Rico thus established by Congress flows the immunity from suit without its consent. It is a right conferred by reason of the governmental powers granted and the responsibilities created by the organic act. This clearly follows from the decision of this Court in *Kawananakoa* v. *Polyblank* (205 U. S. 349, 353), and the reasons which underlie it:

> A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the

[1] Thus far United States citizenship, in name, has been withheld, but the granting of it, in view of the status of Porto Rico has been urged by the Executive and a bill conferring it has passed the House of Representatives and is now before the Senate (see H. R. 20048, 62d Cong., 2d sess.; H. Rep. 341, 62d Cong., 2d sess.; President's message of December 6, 1912, and Annual Report of Secretary of War for 1911, p. 40).

right depends. "*Car on peut bien recevoir loy d'autruy, mais il est impossible par nature de se donner loy.*" (Bodin, Republique, 1, c. 8. Ed. 1629, p. 132. Sir John Eliot, De Jure Maiestatis, c. 3. *Nemo suo statuto ligatur necessitative. Baldus., De Leg. et Const., Digna Vox*, 2d ed., 1496, fol. 51b., Ed. 1539, fol. 61.)

As the ground is thus logical and practical, the doctrine is not confined to powers that are sovereign in the full sense of judicial theory, but naturally is extended to those that in actual administration originate and change at their will the laws of contract and property, from which persons within the jurisdiction derive their rights. A suit presupposes that the defendants are subject to the law invoked. Of course it cannot be maintained unless they are so. But that is not the case with a Territory of the United States, because the Territory itself is the fountain from which rights ordinarily flow. *It is true that Congress might intervene*, just as in the case of a State the Constitution does, and the power that can alter the Constitution might. But the rights that exist are not created by Congress or the Constitution, except to the extent of certain limitations of power. The District of Columbia is different, because there the body of private rights is created and controlled by Congress and not by a legislature of the District. But for the Territory of Hawaii it is enough to refer to the organic act. (Act of April 30, 1900, c. 339, §§ 6, 55; 31 Stat. 141, 142, 150.)

This controls the present case, for there is no difference whatever in the structure of their governments, in the actual exercise of governmental powers, and the relation of independence of the local governments to the National Government, between Hawaii and Porto Rico.

II.

PORTO RICO'S IMMUNITY FROM SUIT, BY VIRTUE OF ITS ORGANIC ACT CREATING A SOVEREIGN BODY POLITIC, WAS NOT LIMITED BY THE SPECIFIC PROVISION CONFERRING UPON THE ISLAND "POWER TO SUE AND BE SUED AS SUCH."

Section 7 of the Foraker Act defines who shall be citizens of Porto Rico, and then provides—

> and they, together with such citizens of the United States as may reside in Porto Rico, shall constitute a body politic under the name of The People of Porto Rico, with governmental powers as hereinafter conferred, and with power to sue and be sued as such.

Upon the assumed significance of this last phrase, "power to sue and be sued as such," the majority of the Insular Supreme Court rested their decision. They found in it a blanket authority to sue *ad libitum* the government established by the organic act. This simple phrase is interpreted to establish for Porto Rico not only a Tucker Act (Act of March 3, 1887; 24 Stat. 505), giving specific permission of the sovereign (using the term in the qualified sense as covering the sovereign's immunity here under discussion) to be sued in a definite class of cases and in a manner and subject to the restrictions that it may see fit to im-

pose, (see *Reid* v. *United States*, 211 U. S. 529, 538), but an unlimited permission, subjecting the sovereign to the same amenability to suit as its individual citizens.

In so holding, the lower court fell into patent error. "Power" was confused with liability. The sole function of the phrase is explicitly to create a legal personality, capacity for litigation, the power to transact business in court, when the sovereign itself invokes the jurisdiction of the court, or when permission to proceed against it is specifically conferred upon the courts.[a] In a word, such a provision merely confers the attribute of individuality and does not enlarge the jurisdiction of courts. This, in effect, was the decision of Chief Justice Marshall in *Bank* v. *Deveaux* (5 Cranch, 61, 85–86):

> This power [to sue and be sued], if not incident to a corporation, is conferred by every incorporating act, and is not understood to enlarge the jurisdiction of any particular court, but to give a capacity to the corporation to appear, as a corporation, in any court which would, by law, have cognisance of the cause, if brought by individuals.

This phrase, in fact, is a bit of congressional redundancy, a denotative description of one of the attributes of sovereignty that would flow as a matter of course. Section 7 merely labeled the sovereignty created by the whole scope of the Foraker Act, and

[a] Such consent has in fact been granted by the Porto Rican Legislature in certain cases not here applicable (sec. 404, Political Code of Porto Rico, and sub-sec. 5 of sec. 1804 of the Civil Code, in connection with sec. 80 of the Code of Civil Procedure).

did not impair the sovereignty created by the rest of that act.

The legislative history of the provision makes this clear beyond peradventure. The specific purpose of its author was merely to confer upon Porto Rico jurisdiction coextensive with that of the Territories, and not to extend the jurisdiction of its own courts against the sovereignty of Porto Rico. The provision, as originally proposed, read "to sue and be sued in the courts of the United States, in all cases in which such courts have jurisdiction, where one of the parties is a State or Territory of the United States." This was amended to its present form, "with power to sue and be sued as such." Senator Foraker's explanation for the reason of the original provision indisputably supports the interpretation here placed upon the amended and retained provision:

> I was having in mind when I drafted the bill the constitutional provision as to the right of a State suing in the Supreme Court of the United States; but when I came to look at it, I discovered what I ought to have known without looking, that Territories are not empowered to sue at all. The provision is only with respect to the Supreme Court. *I thought the entire purpose was subserved by simply giving them power to sue and be sued as a body politic; and then it would be a question of jurisdiction. They can sue in any court that has jurisdiction of the subject matter.* (33 Cong. Rec., Part IV, 3037–3038; italics ours.)

That no provision similar to the one here under discussion is contained in the organic act of Hawaii, passed at the same session of Congress, is wholly without significance, when due regard is given to the actual conditions of Congressional draftsmanship. The two acts issued from two different committees, and were actually drawn by different sets of legislators.[3] Instances, such as this case discloses, of the lack of uniformity in similar enactments and general want of scientific draftsmanship, are bound to present themselves until a permanent legislative drafting bureau, similar to the English system, will be established by Congress.

Conclusion.

It is respectfully submitted that the judgment of the lower court should be reversed, with instructions to the District Court of Ponce to dismiss the case for want of jurisdiction.

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JANUARY, 1913.

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[3] The Hawaiian Act came from the Senate Committee on Foreign Relations and the House Committee on Territories (H. Rep. No. 549, 58th Cong. 1st Sess.); and the Foraker Act came from the Senate Committee on Pacific Islands and Porto Rico and the House Committee on Ways and Means (H. Rept. No. 249, 56th Cong., 1st Sess., and 33 Cong. Rec., Part III, p. 2637-2638, Part V, p. 3975, 56th Cong., 1st Sess.).

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